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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42147

DYNO NOBEL, INC. AND DYNO NOBEL LOUISIANA AMMONIA, LLC v. NUSTAR PIPELINE OPERATING PARTNERSHIP, L.P.

Digest:[1] A shipper located on a pipeline asks the Board to reconsider the agency's decision to hold the shipper's unreasonable practice complaint in abeyance. This decision denies the shipper's petition for reconsideration and continues to hold the proceeding in abeyance.

Decided: September 29, 2017

Dyno Nobel, Inc. and its wholly owned subsidiary, Dyno Nobel Louisiana Ammonia, LLC (collectively, Dyno)[2] have jointly petitioned the Board to reconsider the agency's March 24, 2017 decision holding Dyno's complaint proceeding in abeyance. Dyno Nobel, Inc. & Dyno Nobel La. Ammonia, LLC v. NuStar Pipeline Operating P'ship, L.P. (March 24 Decision), NOR 42147, slip op. at 1 (STB served Mar. 24, 2017). The Board will deny Dyno's petition. As discussed below, although Dyno has attempted to characterize its complaint as involving only unreasonable practice issues that the Board alone can decide, state law issues persist and should be addressed in the first instance by an appropriate court. The Board will continue to hold the complaint proceeding in abeyance while those issues are resolved.

BACKGROUND

In 2013, Dyno decided to locate a facility on a segment of an anhydrous ammonia pipeline, owned by NuStar Pipeline Operating Partnership, L.P. (NuStar), that had been dormant since the late 1990s. NuStar agreed to reactivate its pipeline and provide service to that facility.[3] In 2016, Dyno filed a complaint with the Board alleging that NuStar acted unreasonably and contrary to 49 U.S.C. § 15501(a) by forcing Dyno to pay certain costs associated with repurchasing the property rights for the right-of-way that had allegedly expired under Louisiana

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] Dyno describes itself as a manufacturer and supplier of commercial explosives, agricultural fertilizers, and industrial chemicals.

[3] Unlike railroads, pipelines are not subject to entry or exit licensing by the Board. Thus, Board authorization was not required to take the property out of, or place it into, service.

law and by failing to maintain the original right-of-way while the pipeline was dormant. NuStar moved to dismiss the complaint with prejudice, arguing that it had no common carrier obligation at that time and that Dyno had agreed at the beginning of the project to cover such costs.

In a decision served on March 24, 2017, the Board held Dyno's complaint in abeyance. March 24 Decision, NOR 42147, slip op. at 1. The Board construed Dyno's complaint—which argued that Dyno should not have been required to pay to restore property that should have been maintained during the period of dormancy—as alleging an unreasonable practice. Id. at 4. But the Board also found that tied to the regulatory questions were issues of contract formation and potential voidability under state law (e.g., duress), which, the Board concluded, would have bearing on Dyno's regulatory claim. Id. Because those contractual questions could be best answered by an appropriate court with the relevant expertise and experience, the Board held the regulatory proceeding in abeyance to permit the parties to pursue them in court. Id. at 5. The Board stated that it could address any unreasonable practice, common carriage, or other claim brought by the parties under the Board's pipeline jurisdiction after an appropriate court addresses the state-law contract questions. Id. at 4-5.

On April 7, 2017, Dyno filed a petition seeking reconsideration of the Board's March 24 Decision, claiming that by holding the proceeding in abeyance, the Board committed material error. On April 27, 2017, NuStar replied, pointing out, among other things, that it has already initiated litigation asking a Texas state court to address the contract claims. (Reply 13.)[4]

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. Here, Dyno asserts that the Board materially erred in the March 24 Decision by "requir[ing] Dyno to proceed before a court that cannot grant the relief sought by Dyno and that likely does not have authority to hear the matter." (Pet. 2.) However, Dyno's position is incorrect. Although a state court would have no authority to rule on Dyno's unreasonable practice or common carriage claims, it would have authority to rule on whether the parties entered into a contract, whether the contract covered the actions in dispute, and whether any such contract was void as a matter of law (e.g., a product of duress).

Citing Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 331 (1981), Dyno asserts that the Board has exclusive and preemptive jurisdiction over a pipeline's unreasonable practices, including those involving contracts, and that therefore a court could not rule on any of the issues that are before the Board. (See Pet. 5-6.) The reservation of an administrative remedy does not rule out a judicial declaration as to matters such as whether there were contracts, the terms of the parties' agreement, and whether any such agreement was a

[4] The Board granted a motion for protective order on April 26, 2017, and both parties have filed confidential material under seal.

product of duress.[5] A judicial determination on those issues, which will inform the Board's decision on any unreasonable practice claim that may proceed, will not invade the Board's exclusive jurisdiction over rates and practices. The Board does not expect any court to rule on whether NuStar's actions constituted an unreasonable practice or any other violation of the Interstate Commerce Act. Kalo Brick, which involved preemption of a state-law claim regarding failure to provide rail service over a line previously authorized for abandonment, does not support Dyno's claim of material error.

Dyno also argues that a court ruling on contract issues is not necessary because its agreements with NuStar preserved Dyno's right to bring its unreasonable practice claim before the Board. (Pet. 9-10 & Ex. B (presenting "one representative example of those agreements" to show that it had contractually preserved its right to seek relief from the Board).) But contract issues persist, including Dyno's claim that it "never agreed from the outset of the process in 2012 to cover any and all costs of line service reactivation," (id. at 7), and that its agreement to pay for the costs of resuming service was made under duress—contentions that NuStar disputes.

Dyno argues that the Board misunderstood the parties' agreements reached during their discussions on resuming service. (Pet. 9-10 & Ex. B.) But the Board held this proceeding in abeyance so that a court could determine whether the parties' various conversations and agreements amounted to contracts, and whether there is any validity under state contract law to Dyno's claim of duress. The Board did not rule on any of those issues, nor did it prohibit Dyno from bringing an unreasonable practice case before the agency after any such ruling by an appropriate court.[6]

Dyno asserts that because the reimbursement agreements reserve its right to seek relief at the Board, "there is no need for a court to determine whether the agreements are voidable before

[5] The Board frequently looks to courts to determine questions of contract law in matters that are subject to the Board's exclusive jurisdiction. See, e.g., PCI Transp., Inc v. Fort Worth & W. R.R., NOR 42094 (Sub-No. 1), slip op. at 5 (STB served Apr. 25, 2008) ("The Board typically defers to the courts with respect to whether a valid rail transportation contract exists."); Lackawanna Cty. R.R. Auth.—Acquis. Exemption—F&L Realty, FD 33905 et al., slip op. at 6 (STB served Oct. 22, 2001). Indeed, Dyno itself concedes that courts have institutional expertise with regard to contract questions. (See Dyno Reply to Mot. to Dismiss 24.) The absence of a statutory contract exception for pipelines equivalent to §§ 10709 and 14101(b) for railroads and motor/water carriers does not change this fact. See, e.g., Cleveland-Cliffs Iron Co. v. ICC, 664 F.2d 568, 591 (6th Cir. 1981) (finding that, both before and after the adoption of § 10709, questions about the existence, validity, and performance of contracts is a "purely judicial task" to be made by a court and not the Interstate Commerce Commission).

[6] Citing State of Montana v. BNSF Railway Co., NOR 42124 (STB served Feb. 16, 2011)—a case involving a motion to dismiss—Dyno asserts that the Board committed material error by not "view[ing] the facts as stated in the Complaint in the light most favorable to the Complainant." (Pet. 7.) But here the Board did not rule on NuStar's motion to dismiss. March 24 Decision, slip op. at 4. State of Montana is not relevant to the decision to hold the matter in abeyance.

Dyno seeks relief" from the Board. (Pet. 11.) According to Dyno, "[i]t would make little sense. . . to have to go to court in order to confirm that it has the right to seek relief before the Board in a matter where the Board has exclusive jurisdiction." (Id.) However, the fact that it reserved its right to come to the Board does not negate the existence of contract issues that are more appropriate for a court to resolve, nor does it mean that any such issues, after judicial resolution, would not be relevant to any proceeding before the Board. If, for example, an appropriate court were to find duress, it might void the agreements, which in turn could moot or at least alter Dyno's complaint before the Board. And if a court[7] were to find that Dyno voluntarily agreed to pay start-up costs, that could be relevant to the Board's resolution of the unreasonable practice complaint. See March 24 Decision, slip op. at 4-5.

Dyno claims that it acted reasonably in agreeing to cover NuStar's restoration costs while reserving its right to file with the Board, and that sending the contract issues to court before hearing Dyno's administrative proceeding will discourage parties from making such agreements in the future. (Pet. 12-13.) Dyno also asserts that the Board's decision to hold this case in abeyance pending the outcome of court proceedings makes no sense because a court could not order relief or rule on reasonableness, and because doing so could draw out the proceeding and create uncertainty as to where cases should be litigated. (Id. at 13-15.) But the Board has in several instances held administrative cases in abeyance pending court rulings on matters outside the Board's expertise,[8] and the Board is confident that the various adjudicative bodies will act within their authority. The Board's action did not constitute material error.

It is ordered:

1. Dyno's petition for reconsideration is denied.

2. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.

[7] Dyno argues that the Board erred by suggesting that the contract issues would have to be addressed under Louisiana state law. (Pet. 10-11.) The Board, however, did not intend to decide what state law applies to this matter, but simply to recognize that the issue of applicable law will be addressed by an appropriate state court. In that regard, NuStar points out (Reply 13) that it has already initiated a suit for declaratory judgment in a Texas state court in Case No. 2017CI07109, NuStar Pipeline Operating Partnership L.P. v. Dyno Nobel La. Ammonia, LLC & Dyno Nobel, Inc.

[8] See, e.g., Soo Line R.R.—Pet. for Declaratory Order, FD 36107, slip op. at 4-5 (STB served Aug. 10, 2017) (abeyance pending judicial resolution of contract termination rights under state law); PSI Energy, Inc. v. CSX Transp., Inc., NOR 42034, slip op. at 2-3 (STB served Sept. 11, 1998) (abeyance pending judicial interpretation of contractual shipping limitations).